Supreme Court, U.S.
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No. 99-1473

IN THE

Supreme Court of the United States

STATE OF LOUISIANA, THROUGH THE HONORABLE MURPHY J. FOSTER, JR., GOVERNOR, THE HONORABLE RICHARD P. IEYOUB, ATTORNEY GENERAL, THE SUPERVISORY COMMITTEE ON CAMPAIGN FINANCE DISCLOSURE AND THE DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS AND THE LOUISIANA GAMING CONTROL BOARD,

Petitioners.

v.

CLAUDE M. PENN, JR., GLADNEY L. MANUEL, JR., FELICIANA VENTURES, INC., AND MANUEL'S I-10 AUTO & TRUCK STOP, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE LOUISIANA SUPREME COURT

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Neither corporate respondent has a parent company and no publicly held company owns 10% or more of the stock of either respondent.

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STATEMENT OF THE CASE

During the First Extraordinary Session of the 1996 Legislature, the Louisiana Legislature enacted Acts 67 (also designated as Senate Bill 194) which prohibited candidate and candidate political committee campaign contributions by *some* gaming licensees of the State of Louisiana in state and local elections. The aforementioned legislative enactment was designated as LSA-R.S. 18:1505.2(L).

Under the provisions of the aforementioned legislative enactment, all persons licensed by the Louisiana Gaming Control Board as qualified truck stop facilities and persons who are owners of more than a direct ten percent (10%) ownership interest of such a licensed business entity are prohibited from making campaign contributions to any candidate or political committee of any such candidate.

In addition, on or about August 6, 1996, the Louisiana Gaming Control Board adopted emergency regulations that regulate the conduct of Board members, family members of Board members, Board employees, and all licensees of the Board pursuant to the then existing statutory authority provided by Subsection 6 of Section 13 of Act 7 of the First Extraordinary Session of the 1996 Legislature.[1]

In particular, Emergency Rule 107,-adopted by the Board on August 6, 1996, entitled "Standards of Conduct and Ethical

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1. The then existing text of the law at LSA-R.S. 27:13(C)(6), provided that:

> (C) The board shall adopt rules as ethical rules for members and employees which shall include at a minimum the following:
>
> * * *
>
> (6) No member or board employee nor a member of the immediate family of a board member or board employee nor any *casino operator or any other licensee or permittee shall make a contribution or loan to, or expenditure on behalf of, a candidate or committee*. (Emphasis added)

Rules," provided in Subsection 6(b) thereof that no casino operator, licensee or permittee of the Board shall make a contribution, loan, or expenditure to or on behalf of a candidate or committee. Emergency Rule 107 became permanent Rule 107 of Title 42 of the Louisiana Administrative Code on or about November 20, 1996.[2]

Rule 107 of Title 42 of the Louisiana Administrative Code, entitled, states in pertinent part as follows:

> 6(b) No Casino operator or any other licensee or permittee shall make a contribution or loan to, or expenditure on behalf of, a candidate or committee.

The respondents, Feliciana Ventures, Inc., Manuel's I-10 Auto & Truck Stop, Inc., Mr. Claude M. Penn, Jr., and Mr. Gladney L. Manuel, Jr. desired to make campaign contributions

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2. LSA-R.S. 27:13(C)(6) and Emergency Rule 107 were declared unconstitutional insofar as they precluded contributions to political committees unconnected with candidates in *Brown v. State, Through Dept. of Public Safety and Corrections, Louisiana Gaming Control Board*, 680 So.2d 1179 (La. 1996).

LSA-R.S. 27:13(C)(6) was subsequently amended by the Louisiana Legislature to eliminate the language altogether requiring the Louisiana Gaming Control Board to enact regulations governing the political activities of gaming licensees, which amended statutory provision reads as follows:

> No member or board employee nor a member of the immediate family of a board member or board employee shall make a contribution or loan to, or expenditure on behalf of, a candidate or committee. No member or board employee or immediate family member of a board member or board employee shall receive, directly or indirectly, any contribution or loan from a casino gaming operator or any other licensee or permittee.

Subsequent to the *Brown* decision and the amendment of LSA-R.S. 27:13(C)(6), the Louisiana Gaming Control Board has taken no action to amend or repeal the unconstitutional part of Rule 107 nor the now legislatively unauthorized prohibition pertaining to licensee candidate contributions.

to candidates for elective office at the time of the initial constitutional challenge to the referenced regulatory and statutory provisions. However, they were prohibited from making any such contributions by the applicable provisions of LSA-R.S. 18:1505.2(L) and Rule 107. For the reasons discussed hereinbelow and based upon the jurisprudential principles applicable thereto, it is respectfully represented that the decision of the Honorable Supreme Court for the State of Louisiana was correct in declaring LSA-R.S. 18:1505.2(L)(3)(a)(i), LSA-R.S. 18:1505.2(L)(3)(b)(i), insofar as it is applied to LSA-R.S. 18:1505.2(L)(3)(a)(i) and Rule 107, insofar as Rule 107 precludes candidate and political committee contributions and expenditures by video draw poker licensees, unconstitutional and based thereupon, the petition for writ of certiorari filed on behalf of the State of Louisiana, should accordingly, be denied.

LAW AND ARGUMENT

I. The Honorable Louisiana Supreme Court has correctly held that the candidate and candidate political committee campaign contribution prohibitions imposed by LSA-R.S. 18:1505.2(L)(3)(a)(i) and LSA-R.S. 18:1505.2(L)(3)(b)(i) on qualified truck stop facility licensees and persons who are more than ten percent (10%) owners of such businesses are a violation of respondents' First Amendment rights to freedom of association and freedom of expression.

A. Any abridgment of First Amendment associational freedoms via a limitation, and clearly any prohibition, of campaign contributions of any person implicate an area of most fundamental rights and is subject to the most exacting scrutiny.

It is firmly established under the applicable provisions of the Louisiana Constitution of 1974 as interpreted by the jurisprudence of the Louisiana Courts that merely because a person participates in an industry that may be regulated pursuant to a state's police power, the state is not empowered to invade fundamentally protected rights under the guise of regulation of

this activity via a state's police powers. Indeed, with regard to regulation via a state's legitimate police power, the Louisiana Supreme Court has declared that:

> . . . a constitutional right cannot be abridged under the guise of police regulation. . . The legislature has no power, under the guise of police regulations, arbitrarily to invade the personal rights and liberty of the individual citizen, to interfere with private business or impose unusual or unnecessary restrictions upon lawful occupations, or to invade property rights. *Paillot v. Wooton*, 559 So.2d 758, 761 (La. 1990); *Schwegmann Brothers v. Louisiana Board of Alcoholic Beverage Control*, 43 So.2d 248, 256 (La. 1949).[3]

It is likewise of import to note that while state constitutions may certainly provide no less protection than the federal constitution, a state constitution can certainly provide more protection than any federal counterpart. *Progressive Sec. Ins. v. Foster*, 711 So.2d 675 (La. 1998). The applicable provisions of the Louisiana Constitution of 1974 have consistently been interpreted by the Louisiana Courts, including the Louisiana Supreme Court, in numerous jurisprudential decisions to provide greater protection to Louisiana citizens with respect to individual rights than those of the related provisions of the United States Constitution and Bill of Rights and the United States Supreme Court's interpretations thereof. *State v. Perry*, 610 So.2d 746, 755 (La. 1992).

What is not in contention between any of the parties to this dispute is that the First Amendment guarantees to all citizens the rights to freedom of political association and freedom of

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3. It has further been established by the U.S. Supreme Court jurisprudence in this respect that:

> The power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom. *Cantwell v. Connecticut*, 310 U.S. 296, 304, 60 S. Ct. 900, 903, 84 L.Ed. 1213 (1940).

political expression. *Buckley v. Valeo*, 424 U.S. 1, 15, 96 S. Ct. 612, 633, 46 L. Ed. 2d 659 (1976).

The associational freedoms protected by the First Amendment guarantee a person's freedom to associate with others for the common advancement of political beliefs and ideas and therefore logically the right to associate with the political party of one's choice, all of which freedoms are fundamental components of the liberties and rights accorded to citizens of the United States. *Buckley v. Valeo*, 424 U.S. at 17, 96 S. Ct. at 633 (quoting *Kusper v. Pontikes*, 414 U.S. 51, 56, 57, 94 S. Ct. 303, 307, 38 L. Ed. 2d 260 (1973); *see also Cousins v. Wigoda*, 419 U.S. 477, 487, 95 S. Ct. 541, 547, 42 L. Ed. 2d 595 (1975); *Rosario v. Rockefeller*, 410 U.S. 752, 768, 93 S. Ct. 1245, 1255, 36 L. Ed. 2d 1 (1973); *NAACP v. Alabama*, 357 U.S. 449, 460, 78 S. Ct. 1163, 1171, 2 L. Ed. 2d 1488 (1958).

Campaign contribution limitations restrict the contributor's freedom of association, a freedom that is closely allied to freedom of speech and a right, like freedom of speech, which lies at the foundation of our, and any free, society. *Shelton v. Tucker*, 364 U.S. 479, 486, 81 S. Ct. 247, 251, 5 L. Ed. 2d (1960); *Kusper v. Pontikes*, 414 U.S. at 56-57, 94 S. Ct. at 307. This Honorable Court in *Buckley* has stated relative to campaign contributions that:

> . . . contribution limitations and expenditure limitations operate in an area of the most fundamental First Amendment activities. Discussion of public issues and debate on the qualifications of candidates ate integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by people. *Buckley v. Valeo*, 424 U.S. at 14, 96 S. Ct. at 632.

Indeed, contrary to the suggestions of counsel for the State, the federal and Louisiana jurisprudence has likewise long

recognized that the prohibition of an individual from making a contribution or expenditure to a candidate or political committee of that candidate implicates fundamental and protected rights of the First Amendment which safeguard an individual's right to freedom of association and the right to freedom of expression. *State Through Bd. of Ethics for Elected Officials as Supervisory Committee on Campaign Finance Disclosure v. Duke*, 658 So.2d 1276, 1281 (La. App. 1st Cir. 1995); *Let's Help Florida v. McCrary*, 621 F.2d 195 (5th Cir. 1980); *Buckley v. Valeo*, 424 U.S. 1, 14-15, 96 S. Ct. 612, 636, 46 L. Ed. 2d 659 (1976); *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 102 S. Ct. 434, 439, 70 L. Ed. 2d 492 (1981); *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 779-80, 98 S. Ct. 1407, 1417, 55 L. Ed. 2d 707 (1977); *Vannatta v. Keisling*, 899 F. Supp. 488, 496 (D. Or. 1995); *Shrink Missouri Government PAC v. Maupin*, 922 F. Supp. 1413, 1417 (E.D. Mo. 1996); *Arkansas Right to Life State Political Action Committee v. Butler*, 29 F. Supp. 2d 540, 546 (W.D. Ark. 1998).

Counsel for the respondents respectfully suggests that the jurisprudential decisions of this Honorable Court have never held that anything other than strict scrutiny applies in cases involving campaign contribution limitations and when this Honorable Court in *Buckley* analyzed the subject contribution limitations in that case, it articulated and applied a strict scrutiny standard of review.

In addition, while this Honorable Court in *Buckley* found no constitutional impediment to appropriate campaign contribution *limitations* which serve to prevent the danger of *quid pro quo* corruption expressed in the *Buckley* opinion that could result from large campaign contributions, clearly a *prohibition* of all contributions to all candidates and their political committees by a targeted minority segment of the general public or business community would fall outside of the acceptable parameters set forth in *Buckley*.; *Carver v. Nixon*, 72 F.3d 633, 638 (8th Cir. 1995). Consistent with the above referenced jurisprudential principles, other federal jurisprudence

has consistently held that campaign contribution prohibitions in general are unconstitutional. *Federal Election Commission v. Weinsten*, 462 F. Supp. 243, 249 (1978); *Zeller v. The Florida Bar*, 909 F. Supp. 1518, 1526 (N.D. Fla. 1995).

Counsel for the State also erroneously suggests that campaign contributions limitations are constitutional no matter how low the limit is set and therefore, the State reasons, a campaign contribution prohibition much like an absurdly low contribution limitation should be acceptable. To the contrary, however, the courts have not only held that campaign contributions prohibitions are unconstitutional, but have further held non-discriminatory but generally applicable campaign contribution *limitations* unconstitutional where the amount was so low as to impermissibly burden First Amendment freedom to engage in expressive political activity.

In holding campaign contribution limitations unconstitutional, the court in *Russell v. Burris*, 146 F.3d 563, 571 (8th Cir. 1998), held that campaign contribution limitations to candidates and political committees of candidates ranging from $100 to $300 would significantly impair an individuals rights to exercise his political rights, and further, that the limit was too low to permit "appropriately robust participation in protected political speech and association, and therefore, violated the protections of free speech political speech and free association that the First Amendment affords".

Consistent with the reasoning of the court in *Russell v. Burris*, the court in *California Prolife Council Political Action Committee v. Scully*, 989 F. Supp. 1282, 1296 (E.D. California 1998), held that:

> Because campaign contributions translate into a candidate's speech, and are protected as associational rights they may not be restricted to a degree unnecessary to achieve the governmental purpose. The determination that under specified but constitutionally non-cognizable conditions, $200 suffices, requires that the lower limits be stricken

> . . . the lower limits are not narrowly drawn to achieve a legitimate governmental purpose, and thus the provisions for this lower campaign limitations are constitutionally infirm.

Similarly, the court in *Day v. Holahan*, 34 F.3d 1356, 1366 (8th Cir. 1994), held that a $100 campaign contribution limitation "impaired that ability of individuals . . . to exercise their First Amendment rights" and was "too law to allow meaningful participation in protected political speech and association, and thus, is not narrowly tailored to serve the state's legitimate interest in protecting the integrity of the political system". *See also Carver v. Nixon*, 72 F.3d 633, 641 (8th Cir, 1995) (holding that campaign contribution limitations of $100 to $300 were not narrowly tailored to serve a compelling state interest in preventing corruption of the appearance of corruption associated with large campaign contributions and thus unconstitutionally burden First Amendment rights of association and expression); *Arkansas Right to Life State Political Action Committee v. Butler*, 29 F. Supp. 2d 540, 546 (W.D. Ark. 1998) (holding that $500 limit on campaign contributions was too law to allow meaningful participation in protected political speech and association, and thus, is not narrowly tailored to serve the state's legitimate interest in protecting the integrity of the political system).

The aforementioned thus illustrates the absolute constitutional infirmity of the challenged Louisiana campaign contribution prohibitions. For if the courts have held that a campaign contribution limitation that is too low may serve to impermissibly burden an individual's First Amendment right participate in a meaningful manner in the political process via campaign contributions, then it logically follows as the courts have held in *Federal Election Commission v. Weinsten* and *Zeller v. The Florida Bar*, that campaign contribution prohibitions for whatever reason are constitutionally infirm under any jurisprudential analysis.

Respondents respectfully suggest that the above referenced decisions are consistent with the previous jurisprudential

pronouncements of this Honorable Court relative to campaign contributions and the scope of First Amendment protections. Based thereupon, it is an inescapable conclusion that the challenged Louisiana campaign contribution prohibitions impermissibly burden the First Amendment protection of the respondents as was correctly held by the Louisiana Supreme Court, especially when one considers that the Louisiana Constitution provides broader protection than that of the federal constitution in such matters.

B. Campaign contribution limitations are not permitted to be imposed in a discriminatory manner based solely upon a business activity in which a business entity or person may be engaged, nor may a person be required to surrender any constitutional right, or any part thereof, in exchange for the conferral of some benefit or privilege from the state; Illinois statute imposing campaign contribution prohibitions on liquor licensees repealed some twenty (20) years ago.

Though the state may limit contributions to protect against corruption or the appearance of corruption that may result from the dependence of candidates on large contributions of individual contributors, such is not the case when any such limitation is implemented in a discriminatory manner. *Harwin v. Goleta Water District*, 953 F.2d 488, 490 (9th Cir. 1991). The same would be true of any campaign contribution prohibition that may be constitutionally enacted. For instance, in a case which addressed similar First Amendment restrictions this Honorable Court held that while states could prevent all newsracks from being placed on public sidewalks, the state may not ban only those newsracks which contain certain publications. *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 113 S. Ct. 1505, 123 L. Ed. 2d 99 (1993).

With regard to the enactment of discriminatory provisions which impinge upon the fundamental First Amendment rights of a targeted minority this Honorable Court has stated that:

> . . . some governmental objectives - such as a desire to suppress support for a minority party or an unpopular cause or to exclude the expression of certain viewpoints from the marketplace of ideas — are so plainly illegitimate, that they are forbidden altogether. *Quincy Cable TV, Inc. v. F.C.C.*, 768 F. Supp. 1434, 1451 (D.C. Cir. 1985); see also *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 104 S. Ct. 2118, 2128, 80 L. Ed. 2d 772 (1984).

And that:

> First Amendment rights are indeed fundamental, for "we the people" are the sovereigns, not those who sit in the seats of the mighty. It is the voice of the people who ultimately have the say; once we fence off a group, and bar them from public dialogue, the public interest is the loser. *Broadrick v. Oklahoma*, 413 U.S. 600, 619 93 S. Ct. 2908, 2920, 37 L. Ed. 2d 830 (1973).

In fact, a general perusal of the applicable First Amendment jurisprudence will reveal a long history of decisions that reject attempts to limit the scope of political speech and expression. The theme in spirit if not in fact of these decisions is based upon the following declarations made by this Honorable Court:

> The concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed to secure the widest possible dissemination of information from diverse and antagonistic sources, and to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people. *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 295-96, 102 S. Ct. 434, 437, 70 L. Ed. 2d 492 (1981); (citing) *New York Times*

Company v. Sullivan, 376 U.S. 254, 266, 84 S. Ct. 710, 718, 11 L. Ed. 2d 686 (1964).

Furthermore, though the law which establishes the legitimate nature of video draw poker businesses in the State of Louisiana indicates that the license issued to persons for authorization to conduct video draw poker operations is a privilege, this Honorable Court's jurisprudence is undeniably clear that this does not lessen the First Amendment protections that are accorded to any such persons so licensed to participate in video draw poker activities. In this regard, this Honorable Court has held that even though there may be no obligation to provide to a person a particular benefit conferred by the state, it does not follow that the conferral of such a benefit to any person may be conditioned upon the surrender of a constitutional right.[4] *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 512-14, 116 S. Ct. 1495, 1512-13, 134 L. Ed. 2d 711 (1996); *see also Frost & Frost Trucking Co. v. Railroad Commission of California*, 271 U.S. 583, 594, 46 S. Ct. 605, 607, 70 L. Ed. 1101 (1926) and *Perry v. Sindermann*, 408 U.S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972). This Honorable Court in so holding reasoned that there is no "vice exception" to the protections accorded by the First Amendment. *44 Liquormart, Inc. v. Rhode Island*, 517 at 513-14, 116 S. Ct. at 1512-13.[5]

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4. The outdated principles discussed in *Posadas de Puerto Rico Associates v. Tourism Co. of P.R.*, 478 U.S. 328, 106 S. Ct. 2968, 92 L. Ed. 2d 266 (1986) and *United States v. Edge Broadcasting Co.*, 509 U.S. 418, 113 S. Ct. 2696, 125 L. Ed. 2d 345 (1993) that if a state can ban activity altogether it may limit parts of conduct of individuals engaged in that activity has been wholly rejected by this Honorable Court in *44 Liquormart*. *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 510-11, 116 S. Ct. 1495, 1511, 134 L. Ed. 2d 711 (1996); *Rubin v. Coors Brewing Co.*, 514 U.S. __, __, 115 S. Ct. 1585, 1589, n.2, 131 L. Ed. 2d 532 (1995).

5. It is of import to note, however, that video draw poker activities are legal in the State of Louisiana when conducted by persons licensed by the State and as such it is inconceivable how one could characterize these activities as a vice.

This Honorable Court's decision in *44 Liquormart* has effectively put to rest the notion that any particular industry may be singled out for First Amendment freedom discrimination based upon some mere perception of the industry.[6] Thus, any reasoning that may be found in the *Soto* case has surely been jurisprudentially overruled by this Honorable Court's decision in *44 Liquormart* as well as other subsequent federal jurisprudence discussed hereinabove. The Honorable Louisiana Supreme Court has adopted the binding authority of *44 Liquormart* in *Brown v. State, Through Department of Public Safety and Corrections*, 680 So.2d 1179 (1996), wherein the Court held that there is no vice exception to the First Amendment and struck down a similar campaign finance restriction on Louisiana gaming licensees. In addition, as noted by Justice Kimball in concurring with the Louisiana Supreme Court decision to overturn the challenged state statute in the *Penn* case: A state cannot justify an infringement on protected First Amendment freedoms by alleging that the protected rights relate to a "vice" activity when the State itself allows the so-called "vice" to legally exist. *Penn et al. v. State of Louisiana et al.*, No. 99-CA-2337, 1999 WL 1007264, p. 11 (La. 1999).

The fact is that the gaming industry is no more susceptible to corruption than any other and a history of business in America, and perhaps particularly in Louisiana, would reveal that most industries at one time or another have experienced incidents in which some individual would seek to operate outside acceptable or legal parameters. In any event, any such incident or even the fear of such an event, however, is not sufficient to support the contribution prohibition of the challenged provisions under a clear and express reading of the applicable U.S. Supreme Court jurisprudence. As stated hereinabove, the only legitimate state

6. *See also Carver v. Nixon*, 72 F.3d 633, 640 (8th Cir. 1995) wherein the court held that the public may no more adopt an unconstitutional law any more than the legislature; *Greater New Orleans Broadcasting Association, Inc. v. United States*, 1999 WL 380810 (decided June 14, 1999) (prohibiting statutory advertising bans on lawful casinos).

interest that has been jurisprudentially identified which would support the limitation of First Amendment rights of the general public is the prevention of corruption and the appearance of corruption that may result from a candidate's dependence on large individual contributors and to the extent that these large contributions are given to secure a political *quid pro quo.*

Furthermore, the State makes much of an Illinois Supreme Court case which deferred to the Illinois Legislature on upholding a state statute that prohibited campaign contributions to liquor licensees. Counsel for respondents would respectfully suggest that this Honorable Court has effectively foreclosed the ability of a state to condition the conferral of a privilege or benefit such as a liquor license upon the surrender of a First Amendment protected freedom. It is likewise of import to note that the Illinois law cited by counsel for the State as support for the justification of the challenged Louisiana provisions was repealed by the Illinois legislature some twenty (20) years ago (former Illinois Revised Statute, Chapter 43, paragraph 132 was *repealed in 1979*). It is respectfully suggested to this Honorable Court that the liquor licensees of Illinois, much like those in the state of Louisiana, may give freely to candidates and their committees, subject only to the generally applicable campaign contribution limitations of each respective state.

The Louisiana Supreme Court correctly rejected the holdings of both the *Schiller* case and the *Soto* cases mentioned by the petitioners. In so doing, Chief Justice Calogero in concurring in the decision to hold the challenged statute unconstitutional in the *Penn* case, stated that both cases relied upon *Buckley* to decide the contribution prohibitions but that the two cases did not adequately explain how a prohibition could be acceptable under *Buckley's* reasoning, and that the *Soto* case in particular relied almost solely upon the "questionable" *Schiller* application of the *Buckley"s* principals in upholding the campaign contribution provisions. *Penn et al. v. State of Louisiana et al.*, at p. 6.

C. Challenged provisions which arbitrarily prohibit campaign contributions of only a minority of the video draw poker gaming industry and permits the vast majority of others licensed in that industry as well as other persons similarly regulated in other industries to make campaign and political contributions are unconstitutionally discriminatory.

The respondents further respectfully suggest that the state cannot enact a prohibition applicable solely a part of the gaming industry merely because it may be viewed as a vice activity, though it is clear that any assertion in this respect would be without merit as the gaming industry is no more a vice activity than any other regulated but legally permitted industry in this state. It is certainly no more a vice activity than the sale of alcohol or tobacco, which persons granted the privilege and license by the state to engage in these regulated businesses are not subjected to any campaign contribution prohibitions.

Similarly, the state may not enact a discriminatory campaign contribution prohibition against some group or minority of businesses or persons engaging in a legal business or other activity that may be politically unpopular or even publicly unpopular or to placate any apparent public sentiment. Clearly, however, in enacting the challenged statutory provisions, the Louisiana Legislature has unconstitutionally sought to mute the political voice of some one hundred twenty (120) truck stop licensees and the owners of such businesses under the cloak of its police power. The legislature has excluded, however, over four thousand (4,000) video draw poker licensees from this campaign contribution prohibition. Those excluded from the prohibitions of the campaign contribution prohibition include bars/lounges, hotels/motels, restaurants and device owners who own and operate the video draw poker devices and receive significant revenues therefrom.

The State attempts to make much of the fact that some $205,000,000 was generated by video draw poker devices placed in truck stops, though the State actually contends that this

amount was received by the truck stops which is not altogether a correct statement as is explained more fully hereinbelow. Notwithstanding the aforementioned, there are many other industries in the State of Louisiana which generate substantially greater revenues and actual profits, such as petrochemical and oil and gas and a litany of others, that far exceed those that are generated by the video draw poker truck stops which industries may freely contribute to candidates and political committees.

What the State fails to delineate when illustrating its revenue figures is that the video draw poker industry is composed of licensed establishments who are allowed to permit the placement of video draw poker devices by device owners in their businesses and device owners who are actually licensed to own and operate the video draw poker devices and place the video draw poker devices in licensed establishments such as truck stops for a share of the revenue that is generated by the devices, usually from 40%-50% of the revenue. What the State also fails to clearly delineate is that "net device revenue" is money paid into the devices minus money paid out of the devices for winnings, but before franchise taxes which franchise taxes would amount to 32.5% of the total revenue figure are paid to the state. The actual figure of the $205,000,000 that is left after payment of franchise taxes to the State is $138,375,000 which is the actual amount split with the device owners of which approximately one-half would go to the truck stop licensee under a common fifty-fifty device placement revenue sharing agreement, meaning approximately $69,187,500 in revenue would actually go to the truck stop licensees, which is an amount received by truck stops but of course before expenses, not actual profits to the truck stops.

What the State further fails to indicate is that of the approximately $480,701,000 in after franchise tax revenues generated by video draw poker devices in Louisiana for fiscal year 1998, it would be fair to say that approximately 50% of that revenue went to device owners, or approximately $240,350,500 in before expense revenues went to licensed video

draw poker device owners who *can* still give campaign contributions under the challenged statutory provisions. Based thereupon, and upon the fact that many other industries in the State of Louisiana generate substantially greater revenue and profits than video draw poker truck stops, it is untenable to assert that these corporations or businesses somehow pose a greater threat to the electoral process.

Moreover, as indicated hereinabove, and as illustrated in an abstract of a newspaper article attached to the respondents brief in the state proceedings, of the top fifty (50) companies in Louisiana that earned the most net profits in 1998, there is not a single gaming company in that number. A perusal of the attached list also indicates that there are a number of individual companies that earned far more in net profits than the entire gaming video draw poker industry in Louisiana and individual companies that earned ten (10) times the income before expenses of all video draw poker truck stops in Louisiana, most notably the electric utility company Entergy Corp. As noted by Justice Johnson concurring in the decision to reject the challenged statute in the *Penn* case, Entergy Corporation netted in excess of $789,000,000 for the fiscal year 1998, but yet can freely give to candidates for elective office including to the campaigns of members of the Public Service Commission who directly regulate the rates that the entity charges its customers. *Penn et al. v. State of Louisiana et al.*, at p. 17. If indeed income were a measure for the propensity for corruption and used as a ruler to determine the implementation of statutory campaign contribution prohibitions, then there quite a few other industries that should be barred from making campaign contributions.

In addition, many other similarly regulated businesses in the gaming industry such as indian gaming licensees, lottery licensees and charitable gaming licensees are permitted to exercise their First Amendment freedom to make campaign contributions, unhindered and unfettered by any legislative enactment, subject only to the general statutory limitations

applicable to all citizens of this state by LSA-R.S. 18:1505.2(H)(1)(a).

Moreover, despite the state's purported concern for the public perception of the political process, many other businesses in other highly regulated areas other than gaming are free to contribute to candidates and their political committees, including candidates who may serve on boards or commissions that directly regulate the respective business entities. For instance, persons licensed to sell alcohol and tobacco are not covered by any campaign contribution prohibition. Utility companies may and do contribute to Public Service Commission members' campaigns and to their respective political committees. Insurance companies are permitted to contribute to the campaigns for the election of the Commissioner of Insurance who regulates insurance rates. Contractors who perform public contract work for the respective parishes and the School Board are free to contribute to School Board member and Parish Council member campaigns. Lobbyists are permitted to contribute to legislators whom they seek to persuade. Even lawyers are free to contribute to the campaigns of judges before whom they appear. It is of import to note that, unlike the aforementioned examples, gaming companies cannot even make campaign contributions to the regulatory authority that directly regulates the industry since the gaming board is appointed which appointments must be confirmed by the entire Senate and House of Representatives.

In light of the aforementioned, there can be no legitimate state interest that exists in preventing corruption which is served by the prohibition of truck stop licensees and their owners contributions that does not likewise exist with all other regulated industries in this state. There is no bigger threat presented by campaign contributions from truck stops and their owners than exists with contributions from other businesses in highly regulated industries, especially in those cases where the regulated businesses are permitted to contribute to the campaigns of candidates who directly regulate their respective businesses.

Based upon the aforementioned, one can only conclude that the legislature has sought to arbitrarily mute the political voice of an unpopular minority of businesses and their owners in contravention to the protections of the First Amendment.

D. Because the state has enacted campaign contribution limitations applicable to all persons at LSA-R.S. 18:1505.2(H)(1)(a), which predate the enactment of LSA-R.S. 18:1505.2(L)(3)(a)(i) and LSA-R.S. 18:1505.2(L)(3)(b)(i), the enactment of the challenged provisions serve no interest to prevent corruption or the appearance thereof as video draw poker truck stop licensees can legally exert no more influence via campaign contributions than any other person.

As stated hereinabove, the only legitimate state interest that has been jurisprudentially identified which would support the limitation of First Amendment rights of the general public is the prevention of corruption and the appearance of corruption that may result from a candidate's dependence on large individual contributors and to the extent that these large contributions are given to secure a political *quid pro quo*. Prior to the enactment of Act 67, the state had already taken precautions to limit the corruptive effects of large individual campaign contributions in a constitutional manner by enacting LSA-R.S. 18:1505.2(H)(1)(a). This constitutional statutory mechanism serves to protect the state and the public's interest regarding corruption or the appearance of corruption of the political process through undue influence of large contributors to a candidate or the political committee of that candidate.

The Louisiana Election Code at LSA-R.S. 18:1505.2(H)(1)(a) limits political candidate and committee campaign contributions by any and all persons for certain elections. These statutory provisions limit campaign contributions by a person to a candidate or a candidate's committee as follows: 1) major office — $5,000.000, district

office — $2,500.00; and 3) other office — $1,000.00.[7] As such, all persons of this state are prohibited from contributing more than the delineated amounts in any state election.

Because of the uniformity of statutory limitations placed upon Louisiana citizens as a whole, licensed truck stop businesses and their respective owners may no more influence candidates via campaign contributions than any other person.

Based upon the aforementioned Louisiana Election Code statute, any state interest in preventing actual or apparent corruption of candidates through their dependence on large individual contributors simply does not exist and cannot be used as a justification for campaign contribution prohibitions on persons associated with the gaming industry imposed by LSA-R.S. 18:1505.2(L)(3)(a)(i) and LSA-R.S. 18:1505.2(L)(3)(b)(i).

With this statutory framework enacted in the Louisiana Election Code, it is impossible to effect a *quid pro quo* that *Buckley* and its progeny indicated could result from large campaign contributions. In light thereof, it is inconceivable how the state could justify a further statutory restriction which would impose a more onerous limitation much less an absolute *prohibition* of candidate and political committee campaign contributions by a singular element of businesses and persons owning a percentage of those businesses.

Contrary to the contentions of counsel for the State, there is simply no U.S. Supreme Court, other federal jurisprudence, or jurisprudence of this state which supports the contention that a singular and minority segment of the business community,

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7. The Louisiana Election Code at LSA-R.S. 18:1505.2(H)(1)(a) provides specifically and more fully as follows:

> The following contribution limits are established for contributions made to candidates or the principal campaign committee and any subsidiary committee of a candidate for the following offices:
>
> (i) Major office — five thousand dollars.
> (ii) District Office — two thousand five hundred dollars.
> (iii) Other office — one thousand dollars

owners of this minority segment of businesses, or even the public in general may be totally prohibited from making any campaign contributions to any candidate or political committee of a candidate. There is no U.S. Supreme Court, other federal jurisprudence, or jurisprudence of this state which identifies a state interest that is sufficient to support the total prohibition of candidate or political committee contributions by a singular and minority segment of the business community, owners of this minority segment of businesses, or the public in general.

While it has been held by this Honorable Court in *Buckley* that the state has a legitimate interest in preventing large campaign contributions, this legitimate state interest in limiting campaign contributions does not extend to prohibiting all campaign contributions. *Carver v. Nixon*, 72 F.3d 633, 638 (8th Cir. 1995).

In fact, with regard to absolute prohibitions of First Amendment freedoms, the applicable federal jurisprudence has held that total bans on campaign contributions are generally unconstitutional. *See Federal Election Commission v. Weinsten*, 462 F. Supp. 243, 249 (1978), (holding that the making of a political contribution by an individual is a means of self-expression which is directly linked to that individual's right to vote and that Congress may not restrict an individual's political expenditures and that it may not totally prohibit individual contributions); *see also Zeller v. The Florida Bar*, 909 F. Supp. 1518, 1526 (N.D.Fla. 1995) (addressing the issue of limiting solicitations for contributions wherein the court stated that blanket prohibitions on campaign contributions are generally unconstitutional).[8]

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8. *See also Let's Help Florida v. McCrary*, 621 F.2d 195 (5th Cir. 1980), and *Brown v. State of Louisiana*, 680 So.2d 1179 (La. 1996), (which found no distinction between gaming companies and the general public in holding unconstitutional campaign contribution limitations on gaming interests).

E. In light of the state's certification that video draw poker truck stop licensees and their owners are persons of good character, honesty and integrity who do not pose a threat to the public interest of this state, it is simply untenable for the state to assert the prevention of corruption in enacting the prohibitions contained in LSA-R.S. 18:1505.2(L)(3)(a)(i) and LSA-R.S. 18:1505.2(L)(3)(b)(i).

In addition to the aforementioned, it is even further inexplicable how such a basis as the prevention of corruption would or could be used to support the enactment of campaign contribution prohibitions when the state requires all video draw poker truck stop businesses and business owners to meet onerous suitability criteria and to undergo a detailed and lengthy licensing process which includes the submission of an application containing more than fifty (50) pages of personal and financial history background information prior to licensing for gaming activities. Each applicant for a qualified truck stop facility license is investigated by several layers of review including the Louisiana State Police, the Gaming Section the Department of Justice as well as the Louisiana Gaming Control Board itself, for anywhere from four (4) months to six (6) or more months before a license is issued if all suitability criteria are determined to have been met. The suitability documentation is likewise required for all officers, directors and managerial employees of any such business licensed to operate video draw poker devices.

The statutory scheme which governs the regulation of video draw poker in Louisiana states at LSA-R.S. 27:311(E) as follows:

> No license shall be issued by the division except upon receipt of a sworn application and a finding by the division that the applicant, the application, and all persons described in R.S. 27:310 meet the requirements of that Section.

The aforementioned statutory provision refers to the criteria for licensing for video draw poker activities that are contained in LSA-R.S. 27:310, which in pertinent part are as follows:

* * *

> B. (1) No person shall be granted a license under the provisions of this Chapter unless the applicant has demonstrated to the division that he is suitable for licensing. For purposes of this Chapter, suitability means the applicant of licensee is:
>
> (a) *A person of good character, honesty, and integrity.*
>
> (b) *A person whose prior activities, arrest or criminal record if any, reputation, habits, and associations do not pose a threat to the public interest of this state* or to the effective regulation of video draw poker, and do not create or enhance the dangers of unsuitable, unfair, or illegal practices, methods, and operations in the activities authorized by this Chapter and financial arrangements incidental thereto.
>
> (c) Likely to conduct business as authorized by this Chapter in complete compliance with the provisions of this Chapter. (Emphasis supplied).

* * *

It is simply untenable for the state to on the one hand certify that licensed qualified truck stop facility businesses and their owners are persons of good character, honesty, and integrity whose reputation, habits, and associations do not pose a threat to the public interest of this state, yet on the other hand to enact a statute aimed at prohibiting their ability to contribute campaign contributions to candidates or political committees of candidates in order to prevent corruption or the appearance of corruption of the political process. And because such a position is untenable, it is by definition unconstitutional and

clearly violative of any such person's First Amendment associational right to participate in the electoral process via candidate and committee contributions in the political process.

F. The applicable federal jurisprudence has recognized a legitimate state interest in regulating public employees that differs from its regulation of the general public, which state interests are not present to support the enactment of LSA-R.S. 18:1505.2(L)(3)(a)(i) and LSA-R.S. 18:1505.2(L)(3)(b)(i).

The State argues in part that this Honorable Court should intervene in this state matter because there exists some jurisprudential principles permitting the prohibition of campaign contributions in regard thereto. The relevant federal jurisprudence has, however, recognized only a singular exception to the foregoing issue of total bans on campaign contributions which principle holds that because of the nature of governmental employment, the governmental authorities in some instances may impose certain restrictions upon the political activities of government employees. *U.S. Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548, 556, 93 S. Ct. 2880, 2886, 37 L. Ed. 2d 796 (1973) (upholding Hatch Act's prophylactic ban on certain federal employees from participation in certain political activities and speech); *Broadrick v. Oklahoma*, 413 U.S. 601, 616, 617, 93 S. Ct. 2908, 37 L. Ed. 2d 796 (1973) (upholding Oklahoma statute prohibiting state employees from actively engaging in various types of political activities). The cases are premised upon the government authorities having the following three interests to protect in implementing the constitutionally permissible restrictions imposed on the campaigning activities of governmental employees:

1) An efficient government, faithful to the Congress rather than to a political party;

2) Avoiding the danger of a powerful political machine; and

> 3) Ensuring that governmental employees achieve advancement on their merits and that they be free from both coercion and the prospect of favor from political activity.[9] *Magill v. Lynch*, 560 F.2d 22, 27 (1st Cir. 1977); *United States Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548, 564, 93 S. Ct. 2880, 2890, 37 L. Ed. 2d 796 (1973).

In this regard the courts have reasoned that:

> People who become public employees receive certain benefits and undertake certain duties. One of those duties may require the surrender of rights that would otherwise be beyond the reach of governmental power. *Reeder v. Kansas City Police Board of Police Commissioners*, 733 F.2d 543, 547 (8th Cir. 1984).

None of these governmental interests referenced above are present, however, in the context of First Amendment regulation of the general public which includes the business community and gaming businesses and their owners. In fact, this Honorable Court has long recognized that the government has an interest in regulating the conduct of its employees that differs significantly from those that it possesses in connection with the regulation of the speech of its citizenry in general. *United States Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548, 564, 93 S. Ct. 2880, 2890, 37

9. It is upon these principles espoused in *National Association of Letter Carriers* and *Broadrick* that the court in *Reeder v. Kansas City Board of Police Commissioners*, 733 F.2d 543 relied upon to hold that statute prohibiting Kansas City Police officers from making any political contributions did not violate First Amendment. *See also Wicker v. Goodwin*, 813 F. Supp. 676 (E.D. Arkansas 1992) (holding statute that required Arkansas State Police to remain constantly aloof from politics did not violate First Amendment rights of officers); *Otten v. Schicker*, 655 F.2d 142, 144 (8th Cir. 1981) (upholding a St. Louis Police Department local rule which prevent police officers from running or campaigning for public office).

L. Ed. 2d 796 (1973); *Pickering v. Board of Education*, 391 U.S. 563, 568, 88 S. Ct. 1731, 1734, 20 L. Ed. 2d 811 (1968); *United Public Workers v. Mitchell*, 67 S. Ct. 556, 566-567.

In so holding, this Honorable Court has stated that these First Amendment restrictions that may be constitutionally imposed upon governmental employees would be plainly unconstitutional if imposed outside of that limited arena. *United States v. U.S. National Treasury Employees Union*, 115 S. Ct. 1003, 1012 (1995); *Waters v. Churchill*, 511 U.S. __, 114 S. Ct. 1878, 1887, 128 L. Ed. 2d 686 (1994); *Snepp v. United States*, 444 U.S. 507, 100 S. Ct. 763, 62 L. Ed. 2d 704 (1980).

There is no similar jurisprudential principle in the federal or Louisiana jurisprudence that exists which identifies a legitimate state interest in prohibiting all campaign contributions for a minority of the businesses licensed to participate in the video draw poker industry, nor is there any such jurisprudential principle that exists which would support the prohibition of campaign contributions by the owners of these businesses licensed to participate in the video draw poker industry.[10] Based upon the aforementioned, any argument of the State suggesting that this Honorable Court rely on some jurisprudential principle applicable only to certain government employees as support for the challenged unconsitutional campaign contribution provisions is clearly without merit and a further indication that there is no legitimate basis for the challenges provisions.

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10. While the Federal Election Campaign Act of 1971 at Title 2 U.S.C. § 441b(a) prohibits direct contributions from the treasuries of all corporations, all corporations are permitted to set up political committees and make and/or solicit campaign contributions to and on behalf of federal candidates. See also Title 2 U.S.C. § 441b(b)(2)(c); Title 11 C.F.R. 114.2 and 114.5. The challenged Louisiana statutory provisions prohibit this type of corporate participation in the election process. In addition, unlike the challenged provisions, there is no federal prohibition under the federal election laws which prohibits stockholders of corporations from making campaign contributions.

CONCLUSION

Based upon the aforementioned principles of law and jurisprudence applicable thereto, what the established federal jurisprudence makes clear is that the state cannot say that the gaming industry is inherently vulnerable to corruption and that based upon this premise withdraw one of the most precious freedoms of this land from those who are engaged in gaming activities.

Rather, this Honorable Court has held that when the government defends a regulation of speech as a means to redress past harms or prevent anticipated harms, it must do more than simply posit the existence of the disease sought to be cured . . . it must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way. *U.S. National Treasury Employees Union*, 115 S. Ct. 1003 at 1017; *Turner Broadcasting Systems, Inc. v. Federal Communications Commission*, 512 U.S. 622, 114 S. Ct. 2445, 2450, 129 L. Ed. 2d 497 (1994).[11]

In so holding, this Honorable Court cited Justice Brandeis who has previously held that a reasonable burden on expression required a justification far stronger than mere speculation about serious harms. "Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of free speech to free men from the bondage of irrational fears. To justify suppression of free speech there must be reasonable grounds to fear that serious evil will result if free speech is practiced." *U.S. National Treasury Employees Union*, 115 S. Ct. 1003 at 1017 (citing *Whitney v. California*, 274 U.S. 357, 376, 47 S. Ct. 641, 648, 71 L. Ed. 1095 (1927).

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11. *See also Federal Election Commission v. National Conservative Political Action Committee*, 470 U.S. 480, 498, 105 S. Ct. 1459, 1469, 84 L. Ed. 2d 455 (1985), holding that statute restricting political contributions violated First Amendment where exchange of political favors for uncoordinated expenditures remained a hypothetical possibility and nothing more.

In light of the Louisiana statute which already limits candidate and political committee campaign contributions for all persons, there is no rational or reasonable basis, much less a compelling state interest, nor any factual scintilla of evidence, nor any case law to support a prohibition on certain persons licensed in the gaming industry in Louisiana. The dangers cited in *Buckley* and its progeny as a basis to limit contributions is not present in this matter where the State has already taken precautions to limit the corruptive effects of large individual campaign contributions. The particular interests of state and federal governments that serve to permit in some cases a constitutional limitation on government employees regarding certain First Amendment freedoms is likewise not present in this matter.

There is simply no jurisprudential principle upon which the state can rely to justify the prohibition of a certain element of the gaming industry from making campaign contributions to all candidates and the political committees of all candidates and, therefore, LSA-R.S. 18:1505.2(L)(3)(a)(i) and LSA-R.S. 18:1505.2(L)(3)(b)(i), insofar as it is applied to LSA-R.S. 18:1505.2(L)(3)(a)(i), and Rule 107 insofar as it precludes video draw poker licensees from making campaign contributions, are clearly repugnant to established First Amendment freedoms and have no place in our democratic system of government.

In addition, this Honorable Court's jurisprudence has held that the deference provided to legislative enactments requires that the courts ascertain that the legislative body has drawn reasonable inferences based upon substantial evidence. *Turner Broadcasting System, Inc. v. Federal Communications Commission*, 512 U.S. 622, 114 S. Ct. 2445, 2450, 129 L. Ed. 2d 497 (1994).

In light of the established principles of jurisprudence discussed herein, it is clear that the prohibition imposed by the challenged statutes and regulation impinge on these firmly established fundamental rights and the challenged provisions of the election code are a clear arbitrary, unwarranted and

unconstitutional transgression by the state upon protected first amendment freedoms of respondents.

In concurring with the judgment of the Louisiana Supreme Court in the *Penn* case, Chief Justice Calogero, recognizing the constitutional infirmity of the challenged provisions, noted that:

In sum, the State may set reasonable *limits*, applicable to *all* persons, on campaign contributions, for the *sole* purpose of reducing the corruption that results when contributors give large financial contributions in exchange for political favors, i.e. political quid pro quo. Otherwise, according to *Buckley*, campaign contributions are a type of political expression protected by the First Amendment. Because the Louisiana statutes at issue in this case impose a complete prohibition against targeted individuals, for a purpose other than alleviating corruption form large contributions, they go beyond what *Buckley* upheld. *Penn et al. v. State of Louisiana et al.*, at p. 18.

Justice Kimball of the Louisiana Supreme Court in her concurring decision in the judgment of the *Penn* case further correctly noted that:

> To uphold these laws, which single out a group of persons who operate legal businesses in our State because their political expressions are assumed by some to be harmful, is to begin a descent down a slippery slope. We know not where that slope ends. At any time, our own protected views may be deemed harmful or may become unpopular and we may find ourselves wishing we never started down that path. *Penn et al. v. State of Louisiana et al.*, at p. 11.

It is therefore, respectfully suggested by respondents that the Louisiana Supreme Court was correct when it held that the challenged statutory provisions were unconstitutional. The State can offer no reasonable and non-discriminatory basis nor any acceptable scintilla of quality jurisprudential support for these challenged statutory and regulatory provisions, and as such, this

Honorable Court should permit the Louisiana State Supreme Court decision in this matter to stand for the reasons discussed in the foregoing. Therefore, in light of the foregoing, respondents respectfully suggest that the decision of the Louisiana Supreme Court in declaring the above referenced provisions unconstitutional is legally correct and based thereupon, the petition for writ of certiorari filed on behalf of the State, should, accordingly, be denied.

Respectfully submitted,

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